



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

GRANT WOODS
ATTORNEY GENERAL

1275 WEST WASHINGTON, PHOENIX 85007-2926

MAIN PHONE : 542-5025
TELECOPIER : 542-4085

January 21, 1998

Howard Adams, Director
Arizona Department of Liquor
License and Control
800 West Washington, Fifth Floor
Phoenix, Arizona 85007

RE: I98-002 (R97-009)

Dear Director Adams:

You have requested an opinion to guide the Arizona Department of Liquor Licenses and Control ("Liquor Department") in determining whether various forms of gambling can be conducted legally on the premises of an establishment licensed by Arizona to manufacture, distribute, or sell spirituous liquor. Your focus is the legality of sports pools (such as football, basketball, and fantasy football games), other games of chance (such as card and dice games), and games of skill (such as pool, darts, and intellectual and video games). We conclude that it is unlawful for a liquor licensee to knowingly permit sports pools and other games of chance that involve a wager to be conducted on Arizona liquor-licensed premises. Games of skill such as pool, darts, and intellectual and video games may be conducted legally on licensed premises, but only if they meet the statutory definition for amusement gambling.

Background

The Liquor Department has the authority to regulate and license the manufacture, sale, and distribution of spirituous liquor in this State. *See generally* Arizona Revised Statutes Annotated ("A.R.S."), Title 4. The Liquor Department helps enforce Arizona's gambling statutes because it is unlawful for a liquor licensee to knowingly permit unlawful gambling on its premises. A.R.S. § 4-244(27). Accordingly, you have asked us to opine about the lawfulness of the following types of gambling activity on liquor-licensed premises:

- Sports pool contest. A chart is prepared that consists of a predetermined number of squares arranged in a grid format. A specific chart is used for each sporting event. Participants purchase one or more of the squares for a specified amount of

money. The participants can win all or a portion of the pooled money if their square is successful in the competition.

- Fantasy football contest. A participant purchases an ideal team roster. The roster consists of players selected by the participant for the purpose of competing in the contest. To trade players, participants generally must pay an additional cost. Based upon the performance of the participant's team during the season, relative to the other participants' teams, he or she has an opportunity to win either a portion of the pooled money or a prize.
- Cards and dice games. A participant wagers money for the opportunity to gain something of value (usually, but not limited to, money). Examples of such games are poker, blackjack, and craps.
- Games of skill (such as pool, darts, or intellectual games). The participants bet amongst themselves, and the winner of the competition receives the amount wagered.
- Video games. A participant pays a fee to play an electronic game, where there is no payoff other than the satisfaction of getting the highest score or winning a replay.

Analysis

In Ariz. Att'y Gen. Op. I97-010, we set forth the basic framework for analyzing whether gambling activity is legal in Arizona. The determination involves two separate inquiries: whether the conduct constitutes "gambling" and, if so, whether that form of "gambling" is otherwise lawful under one of the six statutory exclusions in A.R.S. § 13-3302.

A. The Three Required Elements of "Gambling" Conduct

The first question is whether the specific conduct is gambling under Arizona law. To qualify as gambling, three elements must be present: (i) an act of risking or giving something of value, (ii) for the opportunity to obtain a benefit, and (iii) from a game or contest of chance or skill or a future

contingent event. *See* A.R.S. § 13-3301(3). Therefore, it is necessary to analyze each type of conduct listed in your inquiry to determine if each satisfies the three elements of gambling.

1. Risking or Giving Something of Value

If the participant risks something with an economic, monetary, or exchange value (such as money wagered or used to operate or participate in a game or contest), then the first element is satisfied. A.R.S. § 13-3301(3). However, if no money or nothing of value is required to participate, then the conduct is not gambling. For the purposes of this analysis, we will assume that money has been wagered in each type of conduct in your inquiry, so that each type satisfies the first element of gambling.

2. The Opportunity to Gain or Benefit

The second element of gambling requires a determination of whether the participant is entitled to receive anything of value or advantage as a result of playing the game or contest. In the case of sports pools and fantasy football contests, the participant purchases a chance to win all or a percentage of the entire amount wagered. Similarly, in card and dice games, the participant plays for a chance to win something of value (usually money). Moreover, in the pool, dart, or intellectual games, the winner is entitled to receive all or part of the amount wagered. In the case of playing video games where there is no payoff other than the satisfaction of getting the highest score or winning a replay, the satisfaction of getting the high score alone fails to meet the requirements of the second element. However, when the opportunity to receive a free replay is offered, the second element is satisfied. Therefore, the second element of gambling is satisfied in your examples, provided that the participants are playing in order to win something of value.

3. A Game of Chance, Skill or Contingency

The third element requires that the games or contests to be of chance, skill, or contingent upon future events. All of your examples satisfy the final element of gambling.

B. Legally Permissible Gambling

Because A.R.S. § 4-244(27) makes it unlawful for a licensee or employee to knowingly permit unlawful gambling on the premises, the Liquor Department must determine whether the gambling is unlawful. As set forth in more detail in Ariz. Att'y Gen. Op. 197-010, all gambling is illegal in Arizona unless it falls within a statutory exclusion. There are six statutory exclusions to the general ban on gambling. *See* A.R.S. § 13-3302. The three that would most likely arise for the

Liquor Department to consider are the "amusement," "regulated," and "social" gambling exclusions.

1. The "Amusement Gambling" Exclusion

Conduct constitutes "amusement gambling" if the conduct involves a device, game, or contest that is played for entertainment and if it satisfies all four elements in A.R.S. § 13-3301(1) (reproduced in Appendix A hereto).

Sports pools, including football pools, basketball pools, and similar games involving a wager on the outcome of a game, fail to satisfy the "amusement gambling" exclusion. Subsection (a) of A.R.S. § 13-3301 requires the player or players to actively participate in the game or contest or with the device before the exclusion applies. Because participants in sports pools do not actually play the game, they cannot meet this requirement. Additionally, subsection (c) prohibits offering prizes to separate a player from his or her money, yet a strong argument can be made that the prizes in pools are offered as a lure to separate the players from their money. *See* Ariz. Att'y Gen. Op. I97-010 at 3-5. Therefore, sports pools do not qualify for the amusement gambling exclusion.

Fantasy football pools also fail to qualify as amusement gambling. The individuals wagering are not the football players performing in the game, therefore subsection (a) is not satisfied. The outcome is in the control of the actual football teams, not the individuals making the wager, so it fails to satisfy subsection (b). Most fantasy football tournaments offer prizes, some ranging from million dollar purses to Super Bowl packages, so any offering of prizes violates subsection (c). Additionally, none of the subparts of subsection (d) would appear to apply. For example, the companies and individuals that organize and tabulate the calculations generally derive a fee for their service, thus transgressing subsection (d)(ii). Therefore, fantasy football does not satisfy every required element of amusement gambling exclusion.

Games of chance (such as cards or dice) that involve a wager also fail to comply with the amusement gambling exclusion. Although card and dice games arguably satisfy subsections (a) and (b), the existence of a cash pool would be a prize offered as a lure to separate the players from their money, thus violating subsection (c). This conduct also fails to fall within one of the four categories of subsection (d), because card or dice games fail to qualify as an athletic event. Therefore, traditional card and dice games played for money or items of value do not qualify for the amusement gambling exclusion. *See* Ariz. Att'y Gen. Op. I97-010.

Games of skill (such as pool, darts, or intellectual games) that involve a wager theoretically could fall within the amusement gambling exclusion, depending upon the particular

Howard Adams, Director
Arizona Department of Liquor License
and Control
January 21, 1998
Page 5

circumstances. To so qualify, the players must actively participate, no other persons may control the outcome, and prizes may not be offered as a lure to separate the players from their money. In applying the ordinary meaning of the word "athletic" to subsection (d)(ii), we conclude that a game of pool or darts could be an "athletic event" as an "athlete" is "one who is reasonably skilled in physical exercises, sports, or games." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 138 (1978). Therefore, it is conceivable that individuals could legally wager on their own game of pool or darts provided that they meet all of the elements of the amusement exclusion. However, we caution that the factual circumstances must be scrutinized closely to ensure total compliance with all the required elements. For example, the overriding condition for the "amusement gambling" exclusion to apply is that the "device, game or contest [is] played for *entertainment*," not gambling purposes. See A.R.S. § 13-3301(1) (emphasis added). Moreover, if prizes (monetary or otherwise) are offered as a lure to separate the players from their money, it would violate subsection (c). No person other than the players may derive a profit or even a chance of a profit from the money paid to gamble. Given the Legislature's directive that Arizona's Anti-Gambling Act "be liberally construed to effectuate its penal and remedial purposes," 1987 Ariz. Sess. Laws ch. 71 § 1, the Liquor Department should carefully examine all facts surrounding activity allegedly conducted as "amusement gambling" on the premises of liquor licensees.

Intellectual games could satisfy subsections (a), (b), and (c), and fall within subsection (d)(iii) as an intellectual contest or event, provided that the money paid to gamble is part of an established purchase price for a product. In order to qualify, however, such intellectual contests must be registered in advance with the Attorney General. A.R.S. § 13-3311. Generally, bar games requiring a wager will not constitute amusement gambling because the prize is offered as a lure to separate players from their money.

Playing a video game is not gambling if there is no payoff other than the satisfaction of getting the highest score, or if money is not required to play the game. A video game is gambling when the player has the opportunity to receive a free replay; however, the amusement gambling exclusion applies if no benefit or prize is given to the player(s) other than an immediate and unrecorded right to replay which is not exchangeable for value. A.R.S. § 13-3301(1)(d)(i). However, an attempt to offer anything of value as a prize or for a replay credit takes the gambling conduct outside the scope of the exclusion and results in illegal gambling.

2. The "Regulated Gambling" Exclusion

"Regulated gambling" is defined as gambling that, among other things, is "operated and controlled in accordance with a statute, rule or order of this state or the United States." A.R.S. § 13-3301(5)(a). Legalized wagering on horse and dog races (A.R.S. § 5-112), the Arizona Lottery

Howard Adams, Director
Arizona Department of Liquor License
and Control
January 21, 1998
Page 6

(A.R.S. § 5-504), and bingo (A.R.S. § 5-401) would constitute regulated gambling. None of the five types of conduct that you described meets the requirements of regulated gambling.

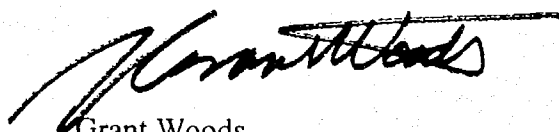
3. The "Social Gambling" Exclusion

If specific conduct qualifies as gambling, that conduct may nonetheless come within the "social gambling" exclusion. *See* A.R.S. § 13-3301(6). However, gambling conducted on a licensee's premises would fail to satisfy the "social gambling" exclusion's prohibition against another person (here, the licensee) receiving any benefit, directly or indirectly, from the gambling activity, including without limitation, benefit of proprietorship, management, or unequal advantage or odds in a series of gambles. A.R.S. § 13-3301(6)(b). Consequently, even if a licensee does not receive any percentage or portion of the direct gamble, the licensee clearly receives benefits from the gambling activity because patrons have the added incentive to frequent the establishment in order to gamble. *See* Ariz. Att'y Gen. Ops. I97-010 and I91-024 (card games and the "shake-a-shift" game constitute illegal gambling). Therefore, all of your examples fail to qualify as social gambling, if the conduct occurs on licensed premises. Indirect benefit (increased patronage and business) is present even if the licensee neither receives a percentage of the money wagered nor participates or supplies equipment for the games.

Conclusion

Sports pools, fantasy football, and card and dice games involving a wager are gambling under Arizona law. These types of games or contests fail to qualify under the amusement, regulated, or social gambling exclusions when they are conducted on liquor-licensed premises. Therefore, sports pools, fantasy football, and card and dice games are unlawful on the licensed premises. Games of skill such as pool, darts, and intellectual and video games as described in your request letter may be legally permissible, but only if they strictly meet all of the required elements of the "amusement gambling" exclusion in A.R.S. § 13-3301(1).

Sincerely,



Grant Woods
Attorney General

APPENDIX A

A.R.S. § 13-3301(1)

1. "Amusement gambling" means gambling involving a device, game or contest played for entertainment if all of the following apply:
 - (a) The player or players actively participate in the game or contest or with the device.
 - (b) The outcome is not in the control to any material degree of any person other than the player or players.
 - (c) The prizes are not offered as a lure to separate the player or players from their money.
 - (d) Any of the following:
 - (i) No benefit is given to the player or players other than an immediate and unrecorded right to replay which is not exchangeable for value.
 - (ii) The gambling is an athletic event and no person other than the player or players derives a profit or chance of a profit from the money paid to gamble by the player or players.
 - (iii) The gambling is an intellectual contest or event, the money paid to gamble is part of an established purchase price for a product, no increment has been added to the price in connection with the gambling event and no drawing or lottery is held to determine the winner or winners.
 - (iv) Skill and not chance is clearly the predominant factor in the game and the odds of winning the game based upon chance cannot be altered, provided the game complies with any licensing or regulatory requirements by the jurisdiction in which it is operated, no benefit for a single win is given to the player or players other than a merchandise prize which has a wholesale fair market value of less than four dollars or coupons which are redeemable only at the place of play and only for a merchandise prize which has a fair market value of less than four dollars and, regardless of the number of wins, no aggregate of coupons may be redeemed for a merchandise prize with a wholesale fair market value of greater than thirty-five dollars.